Supreme Court, U.S.
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No. 99-77

IN THE

Supreme Court of the United States

EXZAVIOUS LEE GIBSON,

Petitioner,

v.

TONY G. TURPIN, WARDEN,
Georgia Diagnostic and Classification
Center,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

PETITIONER'S REPLY MEMORANDUM

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INTRODUCTION

The State's Opposition avoids defending the shocking rule announced below by attempting to create uncertainty as to the facts of this case. The State offers sheer speculation and suspicion as a basis to urge the Court to decline review and wait for a case with "better facts." The State cannot, however, obfuscate the two core facts that frame the question presented:

> (1) Mr. Gibson did not have an attorney in his state habeas proceedings; and
>
> (2) State habeas was Mr. Gibson's first opportunity to raise his ineffective assistance of counsel claims and other claims that were never investigated.

The State's position is not that these core facts fail to raise vital constitutional issues on which this Court has reserved ruling or that they fail to implicate important federalism concerns. Instead, the State simply claims to doubt the accuracy of the core facts and complains that they have never been subject to evidentiary development.

The State's position simply ignores the core facts of this case in an attempt to divert the Court's attention with baseless speculation and suspicion. The record in this case demonstrates with clear and sorrowful eloquence that Mr. Gibson was without counsel. The record is clear that no attorney entered an appearance on Mr. Gibson's behalf and that no attorney represented Mr. Gibson at his habeas hearing. Further, the record is clear that Mr. Gibson had the same lawyer throughout direct review and, therefore, state habeas was his first opportunity to raise ineffective assistance of counsel claims.

That any number of lawyers in the country theoretically could have volunteered their services to Mr. Gibson does not change the fact that he did not have a lawyer. The State's stubborn disbelief that attorneys were unavailable is irrelevant. The State's argument that Mr. Gibson theoretically could have raised his ineffective assistance claims in a motion for new trial

is equally irrelevant. He could have raised this claim only if he had a new lawyer. Because he was not provided with a new lawyer, state habeas was his first opportunity to raise those claims.

At bottom, the State's position is that the Court should defer addressing the question presented until a case with more developed facts arrives. The problem is that cases in this posture will not have the factual record the State demands. Cases in this posture cannot be expected to have, for example, the "types of information and statistics" the State now deems necessary because there will have been no adversarial process in which to develop such facts. Moreover, the issues in this case are extremely unlikely to ascend to the Court from a federal habeas hearing because of the *Teague* bar and related default rules. If the record in Mr. Gibson's case fails to raise the question presented, it is difficult to conceive of what case could meet the high standard the State would impose.

Although the State made the same arguments below, the Georgia Supreme Court squarely held, in direct conflict with the Mississippi Supreme Court, that the denial of counsel in capital habeas proceedings does not violate the U.S. Constitution. The one thing the State seems unwilling to do is defend the Georgia Supreme Court's conclusion.

ARGUMENTS IN REPLY

I. MR. GIBSON WAS NOT REPRESENTED BY AN ATTORNEY AND, THEREFORE, THIS CASE PRESENTS THE QUESTION LEFT OPEN IN *GIARRANTANO*

The State contends that Mr. Gibson essentially waived any right to counsel, that he had "*de facto*" representation of counsel, and that there were lawyers available who could have represented him. Thus, the State concludes that "[p]etitioner's

case does not present the question left open by *Giarrantano*."[1] (Brief in Opp. at 13). Importantly, the State does not contest that this question was left open or that its resolution is vital to the administration of justice in this country. Instead, it simply attacks the plain fact that Mr. Gibson did not have attorney.

A. Mr. Gibson Did Not Have An Attorney

The record unambiguously demonstrates that no attorney ever entered an appearance on Mr. Gibson's behalf. Most importantly, the record unambiguously demonstrates that no attorney represented him at his habeas evidentiary hearing. (*See* App. at A91-A148). The State ignores these plain facts and, instead, attempts to create confusion about a number of other matters that are not in the record and that are irrelevant to whether this Court should grant certiorari.

First, the State suggests impropriety by alleging that the filing of Mr. Gibson's habeas petition was a "maneuver" that was "contrived" to "circumvent new capital habeas timelines." (Brief in Opp. at 1; *see also* Brief in Opp. at 3, 5, 13). As a threshold matter, the timing of Mr. Gibson's habeas petition does not alter the fact that he did not have an attorney.

Further, there was nothing sinister about Mr. Gibson filing his petition to avoid Georgia's new expedited capital habeas procedures. In fact, it was laudable. Under the practice and procedure in effect prior to Rule 44, habeas trial courts enjoyed flexibility to grant continuances that allowed capital habeas petitioners sufficient time to secure counsel before an evidentiary hearing. Rule 44, which became effective on January 1, 1996, severely restricts this flexibility by imposing rigid, expedited timelines under which habeas cases must proceed. Accordingly, eleven death row inmates in Georgia who did not have attorneys filed materially identical form,

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[1] *Murray v. Giarrantano*, 492 U.S. 1 (1989).

"skeletal" habeas petitions in December 1995.[2] These filings were perfectly appropriate -- they were good faith attempts to ensure that the habeas court would have sufficient scheduling flexibility to allow the inmates to find volunteer counsel.

The State also suggests that Mr. Gibson brought his lack of counsel problems on himself by filing his habeas petition pro se before an execution date had been scheduled. (Brief in Opp. at 1, 2, 5, 12-13). In this regard, the State contends that he was not "forced" to proceed without counsel, but instead "voluntarily" chose to proceed without counsel. (Brief in Opp. at 12). That Mr. Gibson voluntarily filed his petition does not alter the fact that he did not have an attorney -- there can be no credible argument that, assuming there is a right to counsel, Mr. Gibson waived this right by filing the petition in accordance with the rules. The question is not whether Mr. Gibson voluntarily filed his petition, it is whether the constitution permits his being forced to proceed through investigation, discovery, and an evidentiary hearing without a lawyer.

Next, the State contends that Mr. Gibson had "*de facto*" representation by the Resource Center (Brief in Opp. at 12, 13-14) and that the Resource Center's amicus curiae status "was nothing more than a ruse to hide the fact that the Resource Center was functioning as counsel." (Brief in Opp. at 13).

The narrowest necessary response to the State's allegations is that the record shows no entry of an appearance by an attorney on Mr. Gibson's behalf and that the transcript of the state habeas evidentiary hearing unambiguously proves that

Mr. Gibson was not represented at the hearing and was forced to proceed alone.[3]

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[2] In addition to the eleven *pro se* petitions, four petitions were filed by volunteer counsel to precede the January 1, 1996 deadline.

[3] The State claims that the Resource Center "addressed the Court on Petitioner's behalf" at the habeas evidentiary hearing. (Brief in Opp. at 7).

However, beyond these unambiguous record facts, the State's contentions amount to nothing more than speculation and suspicion. That the Resource Center provided Mr. Gibson with a form, skeletal pleading -- which did not contain any allegations particular to his case and which was materially identical to ten other habeas petitions filed that day -- is irrelevant. It does not matter where he acquired form pleadings, whether from a book, an attorney, or another inmate. It is equally irrelevant that the Resource Center filed boilerplate motions as amicus curiae requesting continuances in order to find volunteer counsel. The fact is that an attorney never entered an appearance on Mr. Gibson's behalf. The only issue is whether the State was required to provide an attorney.

Finally, the State contends that the Center for Prisoners' Legal Assistance, Inc. (the "CPLA") was available to take Mr. Gibson's case. (Brief in Opp. at 6, 7 n. 7, 15 n. 12, 16-17). Of course, theoretically, every practicing attorney in the country could have taken Mr. Gibson's case -- but the core fact is that none of them did. The CPLA (or its predecessor) has never voluntarily represented death row inmates in habeas proceedings and there is nothing to suggest it ever will. Careful examination of *State v. Davis*, 246 Ga. 200, 269 S.E.2d 461 (1980) -- the case cited by the State to show that the CPLA can take capital habeas cases -- reveals that the Georgia Supreme Court reversed the habeas court's appointment of the CPLA's predecessor to represent a capital habeas petitioner.

Even a cursory review of the hearing transcript makes clear that the Resource Center attorney simply stood up in the public seating area of the courtroom and pleaded with the court to grant a continuance so that Mr. Gibson would have time to secure an attorney. (App. at A93-A104). The Resource Center attorney, who was physically removed from the courtroom before the conclusion of the hearing, obviously did not represent Mr. Gibson at the hearing.

B. This Case Falls Squarely Within The Question Left Open By *Giarrantano*

Because the State contends that Mr. Gibson chose to proceed without counsel, was represented by counsel, or could have been represented by counsel, it concludes that this "case thus does not present the question left open by *Giarrantano*."

The factual circumstances set forth in *Giarrantano* are present in this case. First, as discussed *supra*, Mr. Gibson was not represented by counsel in his habeas proceedings and, in particular, in his habeas evidentiary hearing. In *Giarrantano*, Virginia death row inmates brought a § 1983 action to compel the State to provide attorneys. Virginia law authorized the appointment of counsel, and the Court made clear that such appointments had been made upon request in every case. *Id.* at 10 n. 5. Unlike the inmates in *Giarrantano* who were requesting prospective relief, Mr. Gibson has already been denied an attorney.

Second, as discussed above, Georgia's prison system is not staffed with institutional lawyers to assist in preparing petitions for post-conviction relief. Unlike the "Unit Attorneys" in *Giarrantano*, the CPLA in Georgia has never voluntarily represented death row inmates in capital habeas cases, and the Georgia Supreme Court reversed the one case in which the CPLA's predecessor was appointed to represent them. That the CPLA, just like every other practicing attorney in the country, remains theoretically available to provide representation is not enough to take this case outside of *Giarrantano*. The question is whether the U.S. Constitution has been violated if no attorney provides representation.

Finally, the State argues that Georgia's system of providing $300,000 to the Resource Center falls within the State's "wide discretion to select appropriate solutions." *See Giarrantano*, 492 U.S. at 14. (Brief in Opp. at 14). Once again, the *fact* is

that the Resource Center did not represent Mr. Gibson. Moreover, the Resource Center's charter is simply to track and monitor capital litigation in Georgia and to provide expert assistance to attorneys who volunteer to represent indigent, death-row inmates (App. at A2 n. 1), not to represent every death row inmate in Georgia.[4]

II. STATE HABEAS WAS MR. GIBSON'S FIRST OPPORTUNITY TO RAISE HIS INEFFECTIVE ASSISTANCE CLAIMS AND, THEREFORE, THE CASE PRESENTS THE QUESTION LEFT OPEN IN *COLEMAN*

The State argues that this case does not present the issue reserved in *Coleman*[5] because inmates in Georgia theoretically are able to present ineffective assistance claims in a motion for new trial. (Brief in Opp. at 15-17). Indeed, the State goes so far as to posit that Mr. Gibson was "free to secure new counsel for his motion for new trial and direct appeal." (Brief in Opp. at 9).

This theoretical argument ignores the poverty and powerlessness of death row inmates such as Mr. Gibson. Mr. Gibson is indigent and could not possibly have hired his own attorney. Further, it is disingenuous to expect that he could have figured out for himself that he potentially could have asked for a new lawyer. Perhaps Mr. Gibson's trial attorney was constitutionally ineffective for failing to notify him of this

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[4] That the State suggests this $300,000 appropriation could come close to satisfying its constitutional obligation to Georgia's 120 death row inmates is absurd. The Capital Collateral Regional Counsel organization in Florida, which represents 208 death row inmates, had an $8 million budget. A report submitted in connection with a request to stay all executions in Florida due to insufficient funding found that this $8 million budget was "woefully inadequate" to provide competent capital post-conviction representation. *Arbelaez v. Butterworth*, 1999 WL 419331 (Fla. 1999) (Anstead, J., concurring). The case was subsequently mooted when this funding was increased. *Id.*

[5] *Coleman v. Thompson*, 501 U.S. 722 (1991).

potential right, but this can never be tested under the State's view because Mr. Gibson will never have an attorney to prove it.

Further, that Mr. Gibson theoretically could have secured a new attorney to file a motion for new trial is irrelevant. The core fact is that he did not secure such an attorney. State habeas remains the most common, practical, and accepted vehicle to test the constitutionality of trial counsel's performance, and under Georgia law, ineffective assistance of counsel cannot be raised unless there has been a change of counsel from the trial court. *See, e.g., Harrison v.* State, 201 Ga. App. 577, 581, 411 S.E.2d 738, 741-42 (1991); *Castelle v. Kemp*, 254 Ga. 556, 331 S.E.2d 528, 530 (1985).

III. NO FURTHER EVIDENTIARY DEVELOPMENT IS NECESSARY TO FRAME THE QUESTION PRESENTED

In essence, the State's position is that the Court should not review this case because further development of certain facts is necessary for that review. For example, the State controverts the evidence indicating that Mr. Gibson is borderline mentally retarded. (Brief in Opp. at 1, 8 n. 8). The State also "seriously doubts" that counsel could not be found and guesses that the Resource Center was covertly representing Mr. Gibson. (Brief in Opp. at 7, n. 7, 12, 14-15). The State even argues that because the right to counsel issue was not before the habeas trial court, "the record in the habeas corpus court below was never developed with the types of *information and statistics* which would be necessary if a court were to examine the question whether a capital post-conviction petitioner has a constitutional entitlement to counsel."[6] (Brief in Opp. at 25) (emphasis added).

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[6] The State's contention that the right to counsel issue was not before the habeas trial court is belied by the transcript of the hearing. (*See* App. at A95 (State's attorney arguing that Mr. Gibson has no constitutional right to counsel in habeas proceedings)).

With a case in this posture, the type of factual record sought by the State will rarely, if ever, exist. There was no attorney in the habeas trial court to create the factual record the State now claims is a necessary predicate to this Court's review. Without an attorney below, the Court will never face a case with the statistical and factual development the State now demands. Indeed, the State argued the right to counsel issue below (App. at A95), but did not introduce in that one-sided proceeding the very evidence it now considers indispensable.

Importantly, a federal habeas court will be unlikely to address directly the constitutionality of a state's denial of habeas counsel. If a federal habeas court were inclined to hold that a petitioner's constitutional rights were violated when the State deprived him of habeas counsel, this holding arguably would be barred by the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). *See Sims v. Singletary*, 155 F.3d 1297, 1309 (11th Cir. 1998) (noting that the court need not even reach the merits of *Teague*-barred issues).

In sum, if the record in Mr. Gibson's case fails to raise the question presented, it is difficult to conceive of what case could meet the high standard the State would impose. None of the State's speculation and suspicion alter the core facts of this case, which appear unambiguously in the record.

IV. THE GEORGIA AND MISSISSIPPI SUPREME COURTS OBVIOUSLY ARE IN CONFLICT

In support of its argument that there is no conflict between the Georgia and Mississippi Supreme Courts, the State claims that *Jackson v. Mississippi*, 732 So.2d 187 (Miss. 1999), is "based on circumstances unique to the nature of death penalty litigation in Mississippi." (Brief in Opp. at 18, 20-21).

This argument proves nothing. It is axiomatic that the Mississippi Supreme Court only addressed the death penalty system in Mississippi. Under the State's view, there would

only be a split of opinion among state courts if those courts reached out and held that laws in other states were unconstitutional. The only specific differences between Georgia and Mississippi cited by the State are illusory. (*See* Brief in Opp. at 20-22). Just as in Mississippi, collateral review has become "part of the death penalty appeal process" in Georgia because that is where the overwhelming majority of collateral attacks are mounted. Just as in Georgia, ineffective assistance claims in Mississippi theoretically can be raised on direct review if sufficient factual development is available.

The State also mildly suggests that the Mississippi opinion "may not have been founded upon the federal constitution." (Brief in Opp. at 18 n. 15, 19-20). This argument is belied by the court's opinion. (App. at A82-A90). The opinion never even mentions the Mississippi Constitution. The only constitutional law discussed is federal constitutional law, and the court explicitly based its decision on *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) and *Murray v. Giarrantano*, 492 U.S. 1 (1989).[7]

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant certiorari in this case.

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[7] The State also suggests that certiorari on a denial of discretionary review is inappropriate. To the contrary, the Georgia Supreme Court squarely addressed the question presented in a lengthy, clear, and published opinion, and the Court has taken other cases in precisely this posture. *See, e.g., Konigsberg v. State Bar of California*, 353 U.S. 252 (1957).

Respectfully submitted,

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